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9/28/00

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Oldenstadt Enterprises, Inc.

Serial No. 75/323,590

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for Oldenstadt Enterprises, Inc.

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Before Cissel, Walters and Wendel, Administrative Trademark
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Oldenstadt Enterprises, Inc. has filed an application
to register the mark MOTION MARINE for "custom boats
constructed of welded aluminum."¹

Registration has been finally refused under Section
2(d) of the Trademark Act on the ground of likelihood of
confusion with the registered mark MARINE MOTIONS, INC. and

¹ Serial No. 75/323,590, filed July 14, 1997, claiming a first
use date of January 15, 1988 and a first use in commerce date of
March 1, 1988. A disclaimer has been made of the word MARINE.

design, as shown below, for "electromechanical controls for use in lowering and raising antennas on boats."²

The refusal has been appealed and both applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

We make our determination of likelihood of confusion on the basis of those of the *du Pont* factors³ which are relevant under the circumstances at hand. Two key considerations in our analysis are necessarily the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods in connection with which the marks are being used. See *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

The Examining Attorney maintains that applicant's mark MOTION MARINE is merely a transposition of the significant terms in registrant's mark MARINE MOTIONS, INC., and that these transposed terms create the same commercial

² Registration No. 1,836,624, issued May 17, 1994; Section 8 & 15 affidavits accepted and acknowledged, respectively. A disclaimer has been made of MARINE and INC.

³ *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

impression. Thus, considering the fallibility of purchasers' memories and the ease of transposing the elements of a mark, the Examining Attorney considers confusion likely, when the marks are used on related goods.

Applicant, on the other hand, argues that although the marks contain the same words, the marks are not only different in sound because of the reverse order, but are even more different in appearance, because of the design element present in registrant's mark. Applicant's major contention, however, is that the transposition of the words MARINE MOTIONS of registrant's mark results in a significantly different overall commercial impression for applicant's mark MOTION MARINE.

Applicant argues that its mark MOTION MARINE stresses the "marine" portion, which is being used as a noun to refer to the business of selling boats or nautical material. By contrast, applicant insists that in registrant's mark MOTIONS is the stressed portion, which is being used to refer to the "motion" of its product, which is used in a "marine" setting. Applicant has submitted evidence to support its argument that the term "marine" has a trade meaning in the boating industry and is frequently used by boat-dealing companies in a "noun-like fashion" as the last word in their trade names. Applicant further

argues that since both "marine" and "motion" are highly suggestive when used with nautical products, both marks are weak and even slight differences should be sufficient to avoid confusion.

Where the sole significant difference between marks being used with similar goods or services is the transposition of the words composing the marks and where the transposition does not change the overall commercial impression of the marks, likelihood of confusion may not be precluded. See *In re Wine Society of America Inc.*, 12 USPQ2d 1139 (TTAB 1989); *In re Nationwide Industries Inc.*, 6 USPQ2d (TTAB 1988); *Bank of America National Trust and Savings Association v. American National Bank of St. Joseph*, 201 USPQ 842 (TTAB 1978) and the cases cited therein.

Here the two marks, for purposes of comparison as indicators of source, are reversals of each other. As noted by the Examining Attorney, the term INC. in registrant's mark is an entity designation with no trademark significance. See *In re Packaging Specialists, Inc.*, 221 USPQ 917 (TTAB 1984). The design feature of registrant's mark is minimal and would not be used by purchasers to refer to the goods, if remembered at all. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB

1987). The significant elements are MOTION MARINE and MARINE MOTIONS, the same words (the additional "S" being inconsequential), albeit in reverse order, with the same alliteration. Insofar as the connotations of the two marks are concerned, we agree with the position ultimately taken by the Examining Attorney that both marks are capable of more than one meaning or interpretation. In either mark the term "marine" might be viewed by purchasers as a reference to the boating or nautical business or to the sea itself. While "motions" may be seen as a reference to the antenna movement in registrant's mark, it is equally capable of other interpretations. Purchasers' perception of the connotation of "motion" in applicant's mark is even more uncertain. Although applicant attempts to draw a comparison between the terms "marine life" and "life marine", there is no such clear difference in meaning because of the change of position of "marine" in the present marks. All in all, we find no marked distinction in the commercial impressions created by the two marks, when used with the involved goods.

While we would agree that both marks are suggestive when used with boats or boat accessories, applicant has failed to submit any evidence of third-party use of similar marks for similar goods to support its argument that the

marks are weak and entitled to a limited scope of protection. Moreover, we cannot ignore the fact that the average person is not infallible in his recollection of trademarks and may well transpose the two elements of these marks in his mind, particularly if not viewing the marks side-by-side. See *in re Wm. E. Wright Co.*, 185 USPQ 445 (TTAB 1975); *In re Atlantic Gulf Service*, 184 USPQ 828 (TTAB 1974). Thus, contrary to applicant's argument, we do not consider this to be a situation where small differences would be discerned by purchasers. Instead, we find that the similarities in sound and appearance, considering the ease of transposition, and particularly the similarity in overall commercial impression of the marks, are likely to lead to confusion, if the marks are used in connection with related goods.

Looking to the involved goods, the Examining Attorney argues that a viable relationship exists, in that registrant's electromechanical controls for use in lowering or raising antennas on boats are accessories which would be found on custom boats such as applicant's. She has made of record information obtained from the Internet showing offerings by boat makers of custom boats in which one of the features is either a powered antenna or antenna mounts, masts or wiring conduits for antennas. She further argues

that both types of goods would travel in the same channels of trade to the same purchasers, namely, boat owners. As evidence in support of this argument, she has made of record Nexis articles showing that boat antennas and the controls therefor are available to boat owners themselves for self-installation on their boats to improve television reception.

Applicant argues that, in general, while transposition of elements in marks may contribute to likelihood of confusion, such confusion appears to be likely only when the transposed marks are used with identical or substantially similar goods. Here, applicant insists, the goods are, at best, related in a complementary way and while applicant's boats are sold to the ultimate consumers, registrant's antenna controls are sold to the persons who install the antennas on the boats. Applicant argues that the mere fact that both goods are related to the boating industry, or that one may be used as an accessory on the other, is not sufficient to establish a viable relationship between the goods. Applicant further argues that these are not impulse purchases, with boats in particular being expensive items, and that purchasers would exercise care of the selection thereof.

In the first place, we find no reason to conclude that confusion is likely to occur only when two marks which are transpositions of each other are used on identical or substantially similar goods. As a general principle, it is sufficient to support a holding of likelihood of confusion if there is a viable relationship between the goods and/or the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used therewith, give rise to the mistaken belief that they emanate, or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993) and the cases cited therein. No distinction should be made simply because the similarity of the marks arises from the transposition of the elements of which they are composed and, in fact, the Board has found likelihood of confusion in cases of this nature wherein the goods are clearly not identical. See, for example, *In re Wm. E. Wright Co.*, *supra* (FLEXI-LACE for garment findings, seam bindings, and hem tapes vs. LACE-FLEX for laces in the piece); *In re Atlantic Gulf Service*, 184 USPQ 828 (TTAB 1974) (ATLANTIC GULF SERVICE for cargo transportation by ship vs. GULF ATLANTIC for distribution services, namely, public commercial warehousing, ship-side terminal

operations, and common carrier and contract trucking services).

In the present case, we believe that the Examining Attorney has provided sufficient evidence that purchasers of custom boats such as applicant's would be familiar with the offering of antennas and controls therefor as a featured accessory. In addition, the evidence shows that antennas and the electronic controls therefor are also separately available to boat owners for installation in boats already purchased. Thus, the goods of applicant and registrant are not just complementary, in that applicant's boats when purchased may have been outfitted with antennas and electronic controls therefor. The same purchasers of custom boats such as applicant's are potential purchasers of the antenna controls such as registrant's for installation on boats already owned. Contrary to applicant's arguments, sale of registrant's goods is not in any way restricted to boat-makers or the like, rather than to the ultimate consumer. Not only is there no limitation in the identification of goods in the registration as to the channels of trade but also there is evidence of record to substantiate common channels of trade.

Under these circumstances, we find it likely that purchasers would mistakenly assume that the MARINE MOTIONS antenna controls and the MOTION MARINE custom boats emanate from the same source. Even though these are far from impulse purchases, the evidence showing that not only the boats but also the antennas are expensive items, purchasers are not immune to confusion when marks so readily open to transposition are used therewith.

Accordingly, upon review of all relevant *du Pont* factors, we find that confusion would be likely with applicant's use of the mark MOTION MARINE on the custom boats recited in the application.

Decision: The refusal to register under Section 2(d) is affirmed.

R. F. Cissel

C. E. Walters

H. R. Wendel

Administrative Trademark Judges,
Trademark Trial and Appeal Board

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